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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

■

BETTY BENOIT, *Appellant*

v.

STATE OF MISSISSIPPI, *Appellee*

■

APPEAL FROM THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 (1) of the Supreme Court of the United States, as amended April 6, 1942, appellant files a *statement as to jurisdiction* disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error.

Mississippi Legislation Questioned

The statute, the constitutionality and validity of which is drawn in question here, is Chapter 178 of the General Laws of Mississippi duly enacted at the regular session of the Mississippi Legislature. The statute as originally enacted (House Bill 689) reads as follows:

HOUSE BILL No. 689

AN ACT to secure peace and safety of the United States and state of Mississippi during war; to prohibit acts detrimental to public peace and safety, and to provide punishment for same.

WHEREAS, The imperial government of Japan and governments of Germany and Italy, and associated nations, have expressly declared war upon these United States, a union of which the state of Mississippi is a part; and

WHEREAS, The very life and existence of these United States and the state of Mississippi are threatened by the said foreign powers, and there is now existing an acute unquestionable emergency in these United States and the state of Mississippi; and

WHEREAS, The preservation of the state of Mississippi and these United States depends upon a unity of effort on the part of all the citizens thereof, public necessity requires that the legislative department of the state of Mississippi and of these United States shall enact all laws and do all things necessary to insure domestic tranquility and promote the common defense and general welfare of the people thereof; and

WHEREAS, All persons who either by word or deed weaken the morale or unity of our people, or adversely affect their honor and respect for the flag or government of these United States or of the state

of Mississippi are a menace to the safety of this State and these United States.

NOW, THEREFORE,

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That any person who individually, or as a member of any organization, association, or otherwise, shall intentionally preach, teach, or disseminate any teachings, creed, theory, or set of alleged principles, orally, or by means of a phonograph or other contrivance of any kind or nature, or by any other means or method, or by the distribution of any sort of literature, or written or printed matter, designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi, or who by action or speech, advocates the cause of the enemies of the United States or who gives information as to the military operations, or plans of defense or military secrets of the nation or this state, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatreds, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States, or of the state of Mississippi, shall be guilty of a felony and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States but such imprisonment shall not exceed ten years.

Sec. 2. Any person in possession of maps or parts of maps having marked thereon any industrial, storage or manufacturing plant, power or gas plant, facilities for waterworks, sewerage or sewerage disposal, transportation terminals, shops or facilities, oil and gas pumping and storage station, or government or public buildings, which may be used for information to the enemy or to aid the enemy, without proper authority, shall be prima facie evidence of the inten-

tion of such persons to violate the law and, upon conviction of such possession, shall be punished by a fine not exceeding $1,000.00, or imprisonment in the county jail not exceeding one year, or both such fine and imprisonment.

Sec. 3. That any unnaturalized alien who is questioned on an alleged violation of the provisions of this act by a duly elected, acting and qualified law enforcement officer, and refuses to give information as his or her age, birthplace, parents, places of residence for the last five years; source, amount and extent of salary, compensation, livelihood, and means of travel, if any; marital status, or who answers falsely any such question, or refuses to submit to fingerprinting, or who defies or obstructs the law, or any officer of the law while he is performing his duties with relation to the provisions of this act shall be guilty of obstructing justice and shall be punished therefor as now provided by law.

Sec. 4. That this act is cumulative and does not repeal or interfere with any existing law, but is in addition thereto.

Sec. 5. Except as to cases then pending in court this act shall expire after the duration of the present war.

Sec. 6. If any word, line, section or part of this act should hereafter be declared unconstitutional by the courts, such decision shall not be construed so as to render invalid the remainder of this act.

Sec. 7. That this act shall take effect and be in force from and after its passage.

Approved March 20, 1942.

The Circuit Court which is the trial court and the appellate court, the Supreme Court of Mississippi, held the statute was not unconstitutional and that it was not superseded by federal statutes on the same subject. Such

courts refused to hold that the statute on its face and as construed and applied to the facts abridged the rights of freedom to worship Almighty God, freedom of conscience, of press and speech contrary to the 1st and 14th Amendments to the United States Constitution. Said courts also held that the statute was not vague, indefinite, too general and a dragnet as construed and applied.

Timeliness

The judgment of the Supreme Court of Mississippi was rendered and entered January 25, 1943. (R. 126) The petition for appeal and other papers required by the rules of this court are filed within three months from the date of such judgment. R. 127-140.

Opinions

The opinion of the Supreme Court is reported in 194 Miss. pp. .. and in 11 So. 2d 689. It appears also in the record pages 119 to 125. The opinion is also attached hereto as appendix to this statement.

Statement of Nature of the Case and Rulings of Court Bringing Case Within Jurisdictional Provisions Relied Upon

In the Circuit Court of Marion County, Mississippi, the appellant, Betty Benoit, was indicted by the grand jury. The indictment returned and filed reads as follows:

Indictment

The Grand Jurors came into open court and reported the following numbered indictment to-wit: 1826.

The defendant appealed.

THE STATE OF MISSISSIPPI, COUNTY OF MARION
CIRCUIT COURT, JUNE TERM 1942.

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men of said county, elected, empaneled, sworn and charged to inquire in and for the county aforesaid, at the term aforesaid, of the court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present, that

MRS. VIOLET BABIN
AND
MISS BETTY BENOIT

in said county, on or about the .... day of June, 1942, acting together and in conjunction with each other, as individuals and as members of a certain organization or sect commonly known as Jehovah's Witnesses, did then and there wilfully, unlawfully, feloneously, knowingly and intentionally disseminate and distribute certain literature and printed matter designed and calculated and which reasonably tends to create an attitude of stubborn refusal to salute, honor and respect the flag and government of the United States of America, to wit, a certain publication or journal, entitled "Consolation, a Journal of Fact, Hope and Courage", being Vol. XXIII No. 583 of said publication, dated January 21, 1942, published by Watchtower Bible and Tract Society, Inc., which said publication or journal was printed in the English language and contained an article under the caption "Public Opinion in Maine" in the following words, to wit:

"The Supreme Court decision supporting the legality of a Pennsylvania school board rule requiring children to salute the American flag would have been nearer right, nearer sound, if the Court had simply said that that is a matter of State jurisdiction.

"But see what a pitiful mockery of education that salute to the flag is!

"There is probably not one teacher in twenty,—not one teacher in twenty who can give you a comprehensive, adequate definition of what the flag stands for. What that flag salute amounts to is a contemptible, primitive worship. Those people who put such rules into the State law don't know what they are at work on.

"It is probable that not half a dozen members of any State Legislature can give an adequate definition of what the flag stands for.

"Can any legislator or any teacher give you a better definition of the flag than the emblem of American rights at sea and in foreign lands? That is, that the flag stands for what is precious to Americans outside of America.

"Try another definition. Perhaps this definition is not so good now as it was ten years ago, but say down to ten years ago, the stars and stripes stood for the Supreme Court of the United States.

"As a matter of history it is not too far to say that the Supreme Court of the United States has been the great defender of the American citizen's individual liberty and initiative, of his rights of property, of his right to protection of the laws.

"But the fundamental of that saluting the flag religion is its utter contradiction of good education. What it amounts to is a required worship, worship by the children that don't know what they are worshiping. They never will learn by that kind of tyranny.

"See how much more patriotic it would be if our teachers were given the proper opportunity to help their children to understand the government under which they live. Help them to understand the great principles of the law of the land, the great principles of the common law that the fathers brought over with them when they came from England.

"To help the children to understand what is the law of the land, what are the rights of an American citizen, to

understand what police protection they are entitled to, to understand how their rights can be vindicated in the courts. And especially to understand the function of the court, what the court does for the citizen.

"To help the children to understand the duties of government; and how those duties are divided to the city, the State Government, the Federal Government.

"It is good that the Supreme Court of the United States is not going over the country to tell the States that they can do about the flag.—Lewiston Daily Sun."

and which said publication or journal also contained an article under the caption "French Catholics Start Flag Salute", in the following words, to wit:

"A dispatch from Monte Carlo says, 'The salute to the flag ceremony, now a daily event in all French schools, originated in the Catholic schools of France.' The type of mind that finds satisfaction in worshipping images would also be most inclined toward emblem worship of various kinds. The item confirms the claim that flag saluting in the United States has covertly been pushed by the Catholic Hierarchy here."

and which said publication or journal also contained other articles of similar nature, import and purpose, all of which were then and there designed and calculated and which reasonably tends to create an attitude of stubborn refusal to salute, honor and respect the flag and government of the United States, in violation of the statutes in such case made and provided and against the peace and dignity of the State of Mississippi.

BERNARD CALLENDER
County Prosecuting Attorney

A motion for severance was first granted by the court, and the following proceedings therefore were had on the separate trial of Betty Benoit. R. 5-6.

Appellant filed and urged a motion to quash the indictment (R. 12-15), which was overruled and exception allowed. (R. 15) A demurrer to the indictment was duly filed and urged (R. 8-11), which was overruled and exception allowed. R. 11-12.

Appellant pleaded "not guilty". R. 32.

At close of the State's evidence appellant filed a motion for peremptory instruction requesting the trial court to exclude all the evidence and instructing the jury to return a verdict of "not guilty" (R. 16-18), which was overruled and exception allowed. At the close of the entire case and when both parties had rested their case appellant duly filed a motion for directed verdict requesting the court to exclude all the evidence and direct the jury to return a verdict of "not guilty" (R. 102), which was overruled and exception allowed. R. 102.

Under grounds 1 and 2 of the motion to quash (R. 12-13) the demurrer (R. 8), the motion for peremptory instruction (R. 16), and the motion for directed verdict (R. 102, 112-117), appellant attacked the statute on the grounds that on its face, by its terms, and as construed and applied it abridged the rights of freedom of speech, press and of worship of Almighty God, contrary to the first and fourteenth amendments to the United States Constitution. R. 12-13, 8, 16, 102, 112-117.

Under grounds 4 and 5 of the motion to quash (R. 13-14), demurrer (R. 9), motion for peremptory instruction (R. 17), and motion for directed verdict (R. 102, 112-117), appellant attacked the statute as being unconstitutional because, on its face and as construed and applied, it was and is vague, indefinite, too general, a dragnet and permitted speculation, all of which violated section 1 of the

Fourteenth Amendment to the United States Constitution. R. 9, 13-14, 17, 102, 112-117.

In the Supreme Court of Mississippi under assignments of error numbers 1, 2, 3, and 4 the appellant complains respectively of the error of the trial court in overruling the motion to quash, the demurrer, the motion for peremptory instruction and the motion for directed verdict. (R. 111-112) Under grounds 9 and 10 of the assignments of error it is claimed specifically that the trial court should have held that the statute on its face and as construed and applied abridged the rights of freedom of speech, press and of worship, contrary to the 1st and 14th Amendments. (R. 115) Under ground 11 of the assignments of error it is claimed specifically that the trial court should have held that the statute was vague, indefinite and a dragnet in violation of the 14th Amendment. R. 115-116.

The Supreme Court of Mississippi considered each one of the assignments of error above described and numbered and overruled the same. The court in effect held that on its face and by its terms the statute did not abridge the rights of freedom of speech and press contrary to the federal constitution. The court in effect held that as construed and applied that the rights of freedom of speech, and of press were not abridged contrary to the first and fourteenth amendment. The court in effect held that freedom of worship of Almighty God was not impaired by the conviction and judgment. R. 119.

Thereby the court of last resort in the State of Mississippi sustained the application of the statute to appellant and decided in favor of the validity of the same.

Statement of Facts

Appellant came to Columbia, Mississippi, with her companion, Mrs. Violet Babin, on April 7, 1942, for the purpose of preaching the gospel of God's kingdom to the people of that community. (R. 76, 90) As ministers sent forth by the Watchtower Bible and Tract Society of Brooklyn, New York, they carried on their evangelistic work by calling from house to house and visiting the people in their homes, there presenting to them the various publications of this Society and encouraging those of good-will to read and study same. (R. 93, 96) This was the same work that appellant and her companion had carried on in their native state of Louisiana for the two years just previous. R. 80.

Among the publications thus distributed by appellant, was *Consolation—A Journal of Fact, Hope and Courage,* which is published every other Wednesday and distributed nation-wide, being entered in the mails as second-class matter under the regulations prescribed by Congress. (R. 69, 93-94) This journal is published by the Watchtower Bible and Tract Society for the special benefit of Jehovah's witnesses, as well as for distribution among the general public. R. 55-67, 84.

The entire magazine was introduced in evidence and the original exhibit furnished this court. An examination of its contents shows it to be essentially a news magazine with editorial comment stressing the relationship of current world events to Bible prophecy. It seeks to untangle the maze of news that daily crowds the public press of the nation, and present the more significant items to its readers in a clear understandable manner. It does not feature war-news, but rather covers other matters of general public concern. Its columns are not subject to censorship. It carries no commercial advertising. Printed in 12 languages, its principal purpose is to enlighten and inform its readers on matters vital to their welfare. Its constant purpose is to get at facts and bring into public view everything that

tends to obscure the important issues. Founded in 1919 as *The Golden Age,* more than six and one half million copies were printed in 1942.

The magazine contains items of general public interest, such as reprints and quotations from various newspapers and magazines both secular and religious (R. 43), historical treatises (R. 55-59), letters and reports from Jehovah's witnesses (R. 59-60, 64-67), news items (R. 68, 90), Biblical treatises (R. 69), interesting facts (R. 69), judicial proceedings, and matters touching upon labor, economics, social science, education, commerce, transportation, political science domestic and foreign, agriculture, science, invention, health, home, travel, religion, philosophy, and many others. *Consolation* No. 583, Volume XXIII, issue of January 21, 1942, the one mentioned in the indictment, listed the titles of the articles appearing in the issue of the magazine as follows: "ACTS OF THE THEOCRACY IN NEW ENGLAND, Roger Williams, Jehovah's witness.—THE FORGOTTEN GOD, The Penalty of the Nations for Forgetting.—JESUIT CUNNING UTILIZES COMMUNISM. —INSTINCT AND REASONING IN BIRDS." R. 69.

The Chief of Police of the Town of Columbia, Mr. Bill Owens, testified that he had received many complaints from the people in the town regarding the activity of appellant and Mrs. Babin. The leading business men and officials had advised him that the literature being distributed by appellant was against the government and tended to cause disloyalty among the people. (R. 41) On April 12, 1942, five days subsequent to appellant's arrival at Columbia, it was reported to Mr. Owens that a Bible study was to be held at the home of Annie Felix, a negro resident of the town, whereupon Mr. Owens went to investigate. R. 33, 46.

Upon his first arrival at the house, he found only Annie Felix at home, but when he came back a short time later, he saw appellant and Mrs. Babin in the house, and he walked

into the room and demanded to know what they were doing there. Mrs. Babin handed him her "testimony card" which briefly explained the mission of Jehovah's witnesses. Beyond that it does not appear that either the appellant, Mrs. Babin, or Annie Felix made any remark to him during his visit. R. 79, 92.

The reason given for appellant's presence at Annie Felix's home on the day in question was that appellant and her companion had come to conduct a Bible study with the aid of the *Watchtower* magazine and the Bible. At the time the officer burst into the room, each had a Bible and was preparing for the study. R. 78, 90.

Mr. Owens appeared to be greatly incensed. He stated that he told Annie Felix that he was going to "get rid" of "that stuff" for her; that he "told her [Annie Felix] and this woman a good bit there that afternoon"; and that he wasn't sure whether or not he had threatened Annie Felix that "she had better not be found there with any more of that stuff in her home". (R. 40) Mrs. Babin testified: "He told us that he didn't want us in Town and we would have to leave and that he spoke not only for himself but for the people of the City; and he said only over his dead body would we do this work here. He then grabbed the literature and the phonograph and the lecture and threw it out and broke it and set fire to it." (R. 76) Mrs. Babin went on: "It was a phonograph and a 14- or 15-piece lecture, which was 14 or 15 records of Bible lectures, and he took the literature from the table of Annie Felix and carried it outside and burned it. He broke the phonograph and the 14 or 15 records." (R. 78) The appellant said: "He just marched in and begun to rave and he madly picked up everything within his reach that looked like literature and carried it outside and destroyed it. He didn't ask me anything and I didn't answer him anything." (R. 92) Mr. Owens stated that he saw many *Consolation* magazines at the home of Annie Felix, and he picked up all that he saw, burning same ex-

cept for the issue of January 21, 1942 (No. 583) which he kept. R. 34.

It is not clear just how the magazine came to be in Annie Felix's house. Annie Felix testified that this event took place in her home on Sunday and that on the previous Thursday Mrs. Babin in the company of appellant had called at her home and left several magazines with her, including the one here in question. (R. 47) The witness stated that Mrs. Babin was the one that had handed her these magazines. (R. 50) Yet upon direct examination for the defendant, Annie Felix said that the appellant had never given her any literature of any kind and that Mrs. Babin had given her only one booklet which she identified as *Hope* and which was entered into the evidence as Defendant's Exhibit A-1. (R. 86) Moreover, Mr. W. T. Hornsby, another of Jehovah's witnesses, stated that he had mailed several issues of the *Consolation* magazine to Annie Felix during the winter, but that he was not sure that the issue of January 21, 1942, was included in those he sent. (R. 73) Appellant and Mrs. Babin repeatedly denied having left any magazines or any other literature, with the exception of the booklet *Hope,* at the house of Annie Felix at any time. (R. 88, 77, 79, 85, 91 101) The reason given was because Annie Felix "had all the literature" except the *Hope* booklet which Mrs. Babin then says she left. R. 77.

Annie Felix identified the *Consolation* No. 583 which had been entered in the evidence as one of several Watchtower publications that were lying on the table in her house at the time of Officer Owens' visit on Sunday. (R. 49) She stated that she had read most of this particular issue of *Consolation* (R. 49) and that what she read did not make her feel any less love for her country or for the flag or did it tend to make her "against the Government". Furthermore she agreed that nothing said or done by appellant caused her to "dislike the white people". (R. 47, 48, 51) Police Chief Owens also stated that at the request of the prosecuting

attorney he had read this issue of the *Consolation* magazine and that when he finished he said he felt more respect for the Flag than before, and that he was unable to point out any item other than the two referred to by the prosecuting attorney that was improper or wrong. R. 39, 44.

Both appellant and Mrs. Babin explained that since *Consolation* was a news magazine publishing many news items taken from the public press, they did not necessarily believe or teach everything that appeared in the magazine, but passed it on to the people for what it was worth. R. 84-85, 90.

The State introduced into the evidence two excerpts from *Consolation* No. 583, issue of January 21, 1942, which excerpts were mentioned in the indictment. The first of the allegedly objectionable writings is on pages 9 and 10 of the magazine, and appears in the record at pages 35-37 inclusive. This article in its entirety is reprinted from an editorial appearing in the Lewiston (Maine) *Daily Sun,* and so states at the end of the article. R. 43.

The second article complained of in the indictment is on page 24 of the *Consolation* and appears in the record at page 37. The article is based on a news dispatch from Monte Carlo (Monaco), and contains seven lines of editorial comment besides the actual dispatch.

Grounds and Decisions Sustaining Jurisdiction and Showing that Substantial Federal Questions are Involved

FIRST

The courts below should have held that Section 1 of the statute is void on its face because by its terms it unduly abridges the freedom of speech and of the press, contrary to the First and Fourteenth Amendments to the United States Constitution.

Decisions Cited

Stromberg v. California, 283 U. S. 359

Herndon v. Lowry, 301 U. S. 242

Near v. Minnesota, 283 U. S. 697

Bridges v. California, 314 U. S. 252

Thornhill v. Alabama, 310 U. S. 88

Carlson v. California, 310 U. S. 106

Schneider v. State, 308 U. S. 147

De Jonge v. Oregon, 299 U. S. 353

Schenck v. United States, 249 U. S. 47

Fiske v. Kansas, 274 U. S. 380

State v. Klapprott, 127 N. J. L. 395, 22 A. 2d 877

SECOND

The courts below should have held that Section 1 of the statute is unconstitutional as construed and applied to the facts and circumstances of this case because appellant's rights of freedom of speech, press and worship have been abridged contrary to the first and fourteenth amendments to the United States Constitution.

Decisions Cited

Cantwell v. Connecticut 310 U. S. 296
Schneider v. State 308 U. S. 147
Lovell v. Griffin 306 U. S. 444
Oney v. Oklahoma City 120 F. 2d 861
Lynch v. Muskogee 47 F. Supp. 589
Beeler v. Smith 40 F. Supp. 139
Stromberg v. California 283 U. S. 359
Herndon v. Lowry 301 U. S. 242
Bridges v. California 314 U. S. 252
Thornhill v. Alabama 310 U. S. 88
Carlson v. California 310 U. S. 106
De Jonge v. Oregon 299 U. S. 353
Schenck v. United States 249 U. S. 47
Fiske v. Kansas 274 U. S. 380
Near v. Minnesota 283 U. S. 697

THIRD

The courts below should have held that the statute is unconstitutional as construed and applied because it does not require that there be a showing of a clear, immediate and present danger that disloyalty to the government or an attitude of stubborn refusal to salute, honor or respect the flag or government or any of the other evils that statute is designed to prevent will result, but allows a conviction if the court or jury believes there is a *tendency* to cause such at any time in the future.

Decisions Cited

Schenck v. United States 249 U. S. 47

Bridges v. California 314 U. S. 252

Stromberg v. California 283 U. S. 359

Thornhill v. Alabama 310 U. S. 88

De Jonge v. Oregon 299 U. S. 353

Whitney v. California 274 U. S. 357, 363-369

Herndon v. Lowry 301 U. S. 697

FOURTH

There is no evidence whatever that any of the evils prohibited by the statute, to wit, disloyalty to the government or attitude of stubborn refusal to salute the flag or advocacy of the cause of the enemies will result from the words spoken by appellant or the literature distributed by her.

Decisions Cited

Herndon v. Lowry 301 U. S. 697
McKee et al v. Indiana 37 N. E. 2d 940, —— Ind. ——
People v. Northum 41 C. A. 2d 284, 103 Cal. Supp. 295
Butash v. State 212 Ind. 492, —— N. E. 2d ——
Fiske v. Kansas 274 U. S. 380
Beeler v. Smith 40 F. Supp. 139
State v. Sentner —— Iowa ——, 298 N. W. 813
State v. Aspelin —— Oreg. ——, 203 P. 964

FIFTH

The convictions cannot be based upon isolated statements, oral or written, but the court must examine the entire conversations and the contents of the literature from which such statements are taken to determine the intent and meaning of the language objected to.

Decisions Cited

Schaefer v. United States 251 U. S. 466, 482
United States v. One Book Ulysses 72 F. 2d 705
United States v. Dennett 39 F. 2d 564
Halsey v. New York Society 234 N. Y. 1, 4.
Klaw v. New York Press Co. 137 A. D. 466, 688
Daniel v. Moncure 58 Mont. 193, 200

SIXTH

The general verdict will not support a conviction where the undisputed evidence shows that either ground of conviction violates the constitutional rights of appellant or where one of the provisions of the statute sustaining the conviction is unconstitutional.

Decisions Cited

Stromberg v. California 283 U. S. 359, 363-366
Williams v. State of North Carolina 63 S. Ct. 207, 210
Thornhill v. Alabama 310 U. S. 88

SEVENTH

On its face and as construed and applied the statute is unconstitutional because it is vague, indefinite, uncertain, too general, fails to furnish ascertainable standard of guilt, enables speculation and amounts to a dragnet thereby permitting the denial of liberty contrary to section 1 of the Fourteenth Amendment to the United States Constitution.

Decisions Cited

Thornhill v. Alabama 310 U. S. 88, 97-98
Lanzetta v. State 306 U. S. 451
Herndon v. Lowry 301 U. S. 242
Connolly v. General Const. Co. 269 U. S. 391, 392
United States v. Cohen Grocery Co. 255 U. S. 81
International Harvester Co. v. Kentucky 234 U. S. 216
Standard v. Waugh Chemical 231 N. Y. 51

EIGHTH

The existence of state of war in which the nation is engaged does not limit, suspend or shorten the Bill of Rights or the Fourteenth Amendment but does permit broadening of legislative powers which must find support in direct and specific needs of the fields to which extended and the terms of the statute do not directly pertain to any such needs.

Decisions Cited

Laski, *Liberty in the Modern State*
pp. 56-57, 115, 123, 124-125

Wilson v. Russell 1 So. 2d 569, 146 Fla. 539

Ex parte Milligan 4 Wall. 2, 18 L. Ed. 281, 295

Milk Wagon Drivers Union v. Meadowmoor Dairies
312 U. S. 287, 320

United States v. Carolene Products
304 U. S. 144, 152-153

Discussion

The discussion of the constitutional attack upon this statute as construed and applied to the activity of appellant complained of in the indictment, has been fully presented in the *Statement as to Jurisdiction* filed in the companion case of *Taylor* v. *State,* pages 23 to 30, and by specific reference thereto we incorporate that argument herein as if it were printed at length at this point. Furthermore, we have included as an appendix, the learned dissenting

opinions filed in this case, which further clarify the constitutional issues involved. See also the dissenting opinions filed in the companion cases of *Taylor* v. *State* and *Cummings* v. *State,* which are included in the respective jurisdictional statements in those cases as appendices.

CONCLUSION

For the sake of brevity, reference is here made to Petition for Appeal filed in this cause, with which we incorporate, by such reference, each and every assignment of error therein contained and hereby make the same a part hereof to show that substantial questions were presented before the Supreme Court of Mississippi.

The appellee, State of Mississippi, acting through its counsel of record, has stipulated with appellant to waive the filing of any papers in opposition to the jurisdiction of this court, and reserve the right to urge that no "substantial federal question" be presented in brief and upon oral argument. A copy of such stipulation is attached hereto and marked Appendix B. See page 30.

WHEREFORE the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of this Court, because the courts below disposed of important federal questions in a way that is in conflict with applicable decisions of this Court and have so radically and far departed from the Constitution of the United States and the accepted and regular course of the judicial procedure as to call for this Court's power of supervision to halt the same.

Respectfully and confidently,

HAYDEN C. COVINGTON
117 Adams St., Brooklyn, N. Y.
Attorney for Appellant

APPENDIX A

Opinions

IN THE SUPREME COURT OF MISSISSIPPI
IN BANC:
No. 35163
(Opinion rendered January 25, 1943)

BETTY BENOIT *v.* STATE OF MISSISSIPPI

GRIFFITH, J.

In this case the proof on behalf of the State is in our opinion sufficient to sustain the verdict of conviction and establishes that a companion of the appellant, who was jointly indicted with her, actually distributed and delivered to one of the state witnesses and in the presence of the appellant the particular pamphlet of literature mentioned in the indictment and entitled "Consolation", as a "Journal of Fact," and that both the appellant and her companion admitted to an officer, a witness for the state, that they were distributing this literature. This so-called "Journal of Fact" contained, among other articles, an editorial from the Lewiston Daily Sun which charged, among other things, that "what that flag salute amounts to is a contemptible, primitive worship", and also that saluting the flag is a "pitiful mockery of education." The pamphlet also contains other language undertaking to create prejudice against and disloyalty to, the American flag among Protestant people by charging that the salute to the flag "originated in the Catholic schools of France", and that saluting in the United States "has covertly been pushed by the Catholic Hierarchy here."

We are of the opinion that what the appellant was found guilty by the jury of doing was in violation of Chapter 178, General Laws of Mississippi 1942, and that this case is governed by the controlling opinion in R. E. TAYLOR v. State, No. 35,143, and by both the main and concurring opinions in the case of Clem Cummings v. State, No. 35,143, this day decided. AFFIRMED.

(Opinion rendered January 25, 1943)

IN THE SUPREME COURT OF MISSISSIPPI
IN BANC:
No. 35,163

BETTY BENOIT *v.* STATE

SMITH, C. J., dissenting.

It will be necessary for me to state this case in order that one not familiar with the record may know to what questions this opinion is addressed. This indictment charged the appellant with violating that provision of Chapter 178, Laws of 1942, which prohibits oral, written, printed or phonographic preaching or teaching "which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States or the State of Mississippi". The overt act charged in the indictment and to which the State directed its evidence is the

IN THE SUPREME COURT OF MISSISSIPPI

distribution by the appellant of a certain publication or journal entitled "Consolation" a Journal of Fact, Hope and Courage", which contained an article under the caption "Public Opinion in Maine", which will be set forth in a footnote hereto.*

The appellant is a member of an organization known as Jehovah's Witnesses, the members of which are spreading their conception of the Gospel from person to person and house to house. The journal referred to in the indictment is published monthly by the Watchtower Bible and Tract

* "The Supreme Court decision supporting the legality of a Pennsylvania school board rule requiring children to salute the American flag would have been nearer right, nearer sound, if the Court had simply said that it is a matter of State jurisdiction.

"But see what a pitiful mockery of education that salute to the flag is!

"There is probably not one teacher in twenty,—not one teacher in twenty who can give you a comprehensive, adequate definition of what the flag stands for. What that flag salute rule amounts to is a contemptible, primitive worship. Those people who put such rules into the State law don't know what they are at work on.

"It is probable that not half a dozen members of any State Legislature

Society, Inc., of New York City, a Jehovah's Witness institution, and is distributed by the appellant in the course of the work in which she is engaged. The State's evidence discloses or rather the jury was warranted in finding therefrom, that the appellant went to the residence of Annie Felix and gave her a copy of the issue of this Journal containing the article set forth in the indictment. The record does not disclose that the appellant believes that to salute the flag violates God's Word, or that she so taught, conse-

[*Continued from preceding page*]

can give an adequate definition of what the flag stands for.

"Can any legislator or any teacher give you a better definition of the flag than the emblem of American rights at sea and in foreign lands? That is, that the flag stands for what is precious to Americans outside America.

"Try another definition. Perhaps this definition is not so good now as it was ten years ago, but say down to ten years ago, the stars and stripes stood for the Supreme Court of the United States.

"As a matter of history it is not too far to say that the Supreme Court of the United States has been the great defender of the American citizen's individual liberty and initiative, of his rights of property, of his right to protection of the laws.

"But the fundamental of that saluting the flag religion is its utter contradiction of good education. What it amounts to is a required worship by the children that don't know what they are worshiping. They never will learn by that kind of tyranny.

"See how much more patriotic it would be if our teachers were given the proper opportunity to help their children to understand the government under which they live. Help them to understand the great principles of the law of the land, the great principles of the common law that the fathers brought over with them when they came from England.

"To help the children to understand what is the law of the land, what are the rights of an American citizen, to understand what police protection they are entitled to, to understand how their rights can be vindicated in the courts. And especially to understand the function of the court, what the court does for the citizen.

"To help the children to understand the duties of government; and how those duties are divided to the city, the State government, the Federal Government.

"It is good that the Supreme Court of the United States is not going over the country to tell the States what they can do about the flag.—Lewiston Daily Sun." Which said publication or journal also contained an article under the caption "French Catholics Start Flag Salute", in the following words, to wit:

"A dispatch from Monte Carlo says, 'The salute to the flag ceremony, now a daily event in all French schools, originated in the Catholic schools of France.' The type of mind that finds satisfaction in worshiping images would also be most inclined toward emblem worship of various kinds. The item confirms the claim that flag saluting in the United States has covertly been pushed by the Catholic Hierarchy here."

quently no question of religious liberty is here presented. The salute of flag provision of this statute may violate, on its face, the constitutional guaranties of freedom of speech and of the press, but it is subject to the criticism that a sufficiently ascertainable standard of guilt can not be found in the words "honor or respect the flag or government of the United States or of the State of Mississippi", Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066, and for that reason should be held to be invalid.

The question presented on the merits of the case is: Is the article, set forth in the indictment and appearing in the issue of the Journal, entitled "Consolation," etc. given by the appellant to Annie Felix within the condemnation of the statute? This article is not addressed to voluntary saluting of the flag, but is simply a vigorous protest, giving reasons therefor, against statutes and school by-laws requiring public school children to salute the flag, and against a decision of the Supreme Court of the United States upholding such a requirement. This the statute does not and could not constitutionally forbid, for full and free public discussion of such matters is well within the constitutional guaranty of freedom of speech and of the press. Sullens v. State, 191 Miss. 856, 4 So. 2d. 356. These guaranties are not only for the protection of individual but are also for the protection of the public in its right, fundamental in a democracy, to have the benefit of full and free discussion of governmental policies and of the conduct of government officials, cite authority for which would be supererogatory. The appellant's request for a directed verdict of not guilty should have been granted.

Alexander and Anderson, JJ., concur in this opinion.

IN THE SUPREME COURT OF MISSISSIPPI
IN BANC:
No. 36163

(Opinion rendered January 25, 1943)

BETTY BENOIT *v.* THE STATE

ALEXANDER, J., dissenting.

It seems to me that the momentum engendered by the views expressed in the controlling opinions in the companion cases (Taylor v. State and Cummings v. State, decided this day) should have been checked before encompassing the appellant here.

From the pamphlet "Consolation", made the basis of a fear of revolution or sedition, it may be safely assumed that the State has culled its most potent paragraphs. These selections are set forth in the indictment and quoted in other opinions herein. In comparing these vaporings with the daily utterances of our metropolitan press and of men in high places, it becomes difficult to reconcile the internment of the one and applause of the other with an equal protection of the law.

In this connection, attention is called to the fact that part of the language charged to be subversive is quoted from the press, the Lewisburg Daily Sun. No pains have been taken to disclose whether this widely distributed publication has felt the heavy hand of judicial restraint. It serves to emphasize that to invest oneself with an aura of sophistication is a guaranty of immunity. The ill-advised designation of this prohibition of the compulsory salute by pupils in schools as a "pitiful mockery of education" is hardly less positive and much less authoritative than the expression of the Court in Barnette v. Board of Education (decided Oct. 6, 1942 by a three-judge federal court) that its compulsion against conscience "is a petty tyranny unworthy of the spirit of this Republic."

In addition to comments in the dissenting opinion in

Cummings v. State (decided this day) as to the effect of the war emergency, I take occasion to quote the following pertinent and persuasive paragraphs:

"In a time of crisis, particularly, when the things we hold most dear are threatened, we shall find the desire to throw overboard the habits of tolerance, almost irresistible.". . . . "I can think of no revolutionary period in history when a government has gained by stifling the opinion of men who did not see eye to eye with it; and I suggest that the revolutionary insistence that persuasion is futile finds little creative evidence in its support." . . . . "It is evident from our experience that to limit the expression of opinion in wartime to opinion which does not hinder its prosecution is, in fact, to give the executive an entirely free hand, whatever its policy, and to assume that, while the armies are in the field, an absolute moral moratorium is imperative. That is, surely, a quite impossible position. No one who has watched at all carefully the process of governance in time of war can doubt that criticism was never more necessary. Its limitation is, in fact, an assurance that the unity of outlook is a guarantee that mistakes will be made and wrong done. For once the right to criticise is withdrawn, the executive commits all the natural follies of dictatorship.". . . . "Freedom of speech, therefore, in wartime seems to me broadly to involve the same rights as freedom of speech in peace. It involves them, indeed, more fully because a period of national trial is one when, above all, it is the duty of citizens to hear their witness." Laski, Liberty in the Modern State, pp. 56-57, 115, 123, 124-125.

Our solicitude should include the danger that in repressing fundamental rights we may lose the war upon our own home front. The conduct of the war is, of course, directed toward its success; but success means not only winning the fight but not losing our freedom.

I realize the difficulty of restricting the bases for decision to the particular case disclosed by the record before us,

as well as the self-control necessary to exclude personal predilections from judgments which should be justified solely by the applicable law. To do otherwise is to destroy the defendant with the very sword with which she had sought to protect her rights. "A judge would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief." Cardozo, The Nature of the Judicial Process, p. 108.

The absence of a definite legal yardstick by which to measure appellant's 'disloyalty' is as important here as in the other cases mentioned. At the expense of repetition, the opinions voiced must bear fruitage in conduct and such conduct must threaten a clear and present danger, and such danger must be that the functions of the government will be overthrown by force or violence or that mutiny or insubordination be engendered in our armed forces. "A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only things it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise. Again, any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men. The standard, that is, must be fixed.". . . . "Finally, any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was." Holmes' Common Law, at p. 110-111.

The Chief Justice and Judge Anderson concur in this opinion.

APPENDIX B

Stipulation

IN THE SUPREME COURT OF MISSISSIPPI

R. E. TAYLOR, Appellant, v. STATE OF MISSISSIPPI	No. 35143
CLEM CUMMINGS, Appellant, v. STATE OF MISSISSIPPI	No. 35155
BETTY BENOIT, Appellant, v. STATE OF MISSISSIPPI	No. 35163

Now come Appellants, R. E. Taylor, Clem Cummings, and Betty Benoit, by and through their attorney, Hayden C. Covington, and the Appellee, The State of Mississippi, through its attorney, George H. Ethridge, Assistant Attorney General, and stipulate as follows:

In order that these appeals may be submitted to the United States Supreme Court on the merits at the present term, it is agreed that the appellee, The State of Mississippi, waives its right to file a statement disclosing any matter or ground making against the jurisdiction of the United States Supreme Court asserted by the appellants in their jurisdictional statements and reserves the question of whether or not the cases should be dismissed for "want of substantial Federal question" for consideration of the Federal questions presented on a hearing of these causes on the merits and oral argument thereof before the United States Supreme Court.

Dated: February 23, 1943.

Hayden C. Covington
Attorney for Appellants

George H. Ethridge
Attorney for Appellee